Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C 2295 OF 1982
VISU SINNADURAI J
17 AUGUST 1993

Contract *— Breach of contract — Unsuitability for particular purpose — Whether buyer's refusal to proceed due to misconstruction of contract or erroneous belief amounted to repudiation — Contracts Act 1950 s 40*

Contract *— Breach of contract — Anticipatory breach — Whether seller could treat buyer's request to take back goods sold and delivered before payments were due as anticipatory breach of contract — Sale of Goods Act 1957 s 60*

Contract *— Collateral warranty — Whether oral representation was a collateral warranty or collateral contract — Whether buyer could rely on oral collateral contract to terminate main contract — Whether buyer only entitled to damages for breach of oral collateral contract*

Contract *— Damages — Measure of damages — No proof of damage — Nominal damages*

Evidence *— Burden of proof — Oral collateral contract*

The defendant purchased two units of excavators from the plaintiff and used them on its worksite. After two months, the defendant requested the plaintiff to take back the excavators, on the ground that they were not suitable for the purpose for which were bought. The defendant sought to rely on an 'oral collateral warranty' given by the plaintiff to the effect that if the excavators were found to be unsuitable, they could be returned to the plaintiff without incurring any financial liability. There was a dispute as to whether such a collateral condition actually existed, and the plaintiff brought an action for damages for, inter alia, the depreciation in value of the excavators as a result of the defendant's use of the excavators during the two-month period.

Held, granting only nominal damages to the plaintiff:

(1) Here, the defendant was not suing for damages based on the oral statement allegedly made by the plaintiff but was seeking the right to terminate the contract. Therefore, the term could not be interpreted to mean a collateral warranty but should be taken to mean a collateral contract. An oral collateral warranty is merely a term of a contract, the breach of which only entitles the party to sue for damages, and does not give the party the right to repudiate the contract. Similarly, the breach of a collateral contract only gives rise to an action for damages and not a right to repudiate the main contract.

(2) A cautious approach is adopted by the courts in recognizing the existence of a collateral contract, especially in cases where it

contradicts the terms of a written contract. The burden of proving the existence of a collateral contract is on the party alleging its existence and the mere fact that the defendant deemed it rightful for him to return the two excavators to the plaintiff did not establish the existence of such a collateral contract.

(3) Moreover, a collateral contract, by its very nature exists side by side with the main contract. It does not have the effect of substituting the main contract. A collateral contract merely confers other rights which are not incorporated in the main contract, but such rights must be related to the rights and obligations of the parties under the main contract. Therefore, any representation made by a party to the contract which has the effect of destroying the main contract, cannot become a collateral contract. Here, there was clearly an agreement between the parties for the sale and purchase of the two excavators. However, if the defendant's contention was accepted, the effect of the alleged collateral contract would be to obliterate the main contract of sale or to convert it into a conditional contract. There cannot be a collateral contract without the main contract being in existence. If the defendant was allowed to return the excavators without incurring any financial obligation to the plaintiff, the main contract becomes meaningless as the defendant would no longer be under any obligation to buy the excavators under the main contract.

(4) There was insufficient evidence to establish that the excavators which were supplied by the plaintiff were unsuitable for the defendant's purpose. The defendant had not established any other evidence, other than his own bare assertion that it was unsuitable. The defendant knew the nature and capability of the excavators that were ordered by it. What in fact was supplied to him was the exact model of the excavators as ordered.

(5) The action of the defendant when it indicated to the plaintiff that it did not wish to proceed with the purchase of the two excavators and requesting the plaintiff to take them back, clearly went to the root of the contract of sale and amounted to a repudiation of the contract as it evinced an intention not to proceed with the contract for sale. The act of the defendant clearly amounted to one which the plaintiff could treat as an anticipatory breach of the contract.

(6) There was no proof of any actual depreciation of the machines and therefore, the court was unable to grant any damages except by way of nominal damages.

Obiter:

It would have been different, if the defendant had alleged, as often is the case in collateral contracts, that the plaintiff gave an assurance that the two excavators were capable of bearing the weight of the 1.8 cu yd buckets as well as the 1.2 cu yd buckets. In such a case, the defendant may bring an action against the plaintiff for misrepresentation, or breach of condition or warranty under the collateral contract.

A **[Bahasa Malaysia summary**

Defendan telah membeli dua unit jentera penggali daripada plaintif dan menggunakan jentera tersebut di tapak kerjanya. Selepas dua bulan, defendan telah meminta plaintif supaya mengambil balik jentera penggali tersebut atas alasan bahawa ia tidak layak untuk digunakan B bagi tujuan ia dibeli. Defendan cuba bergantung kepada suatu 'waranti kolateral lisan' (oral collateral warranty) yang telah diberi oleh plaintif yang mengatakan bahawa jika jentera penggali itu didapati tidak layak digunakan, ia boleh dipulangkan kepada plaintif tanpa sebarang liabiliti kewangan. Suatu pertikaian telah timbul mengenai sama ada syarat C kolateral itu sebenarnya wujud, dan plaintif telah membawa suatu tindakan untuk menuntut ganti rugi bagi, antara lain, susutnilai jentera itu akibat penggunaannya oleh defendan dalam jangkamasa dua bulan itu.

Diputuskan, memberikan hanya ganti rugi nominal kepada plaintif:

D (1) Di sini, defendan tidak mendakwa untuk ganti rugi berdasarkan kenyataan lisan yang dikatakan telah dibuat oleh plaintif tetapi beliau menuntut hak untuk menamatkan kontrak itu. Oleh itu, terma itu tidak boleh ditafsirkan sebagai suatu waranti kolateral tetapi sepatutnya dimaksudkan sebagai suatu kontrak kolateral. E Suatu waranti kolateral lisan adalah semata-mata suatu terma kontrak, yang mana kemungkirannya hanya melayakkan sesuatu pihak untuk menuntut ganti rugi dan bukan untuk menolak kontrak itu. Begitu juga, kemungkiran suatu kontrak kolateral hanya menimbulkan suatu tindakan untuk ganti rugi dan bukannya hak untuk menolak kontrak utama itu.

F (2) Mahkamah mengikut pendekatan yang berhati-hati dalam mengakui kewujudan sesuatu kontrak kolateral, terutamanya dalam kes di mana ia menyanggah terma sesuatu kontrak bertulis. Beban membukti kewujudan suatu kontrak kolateral terletak pada pihak yang mengatakan bahawa ianya wujud dan hakikat bahawa G defendan menganggap bahawa adalah betul untuk beliau memulangkan dua jentera itu kepada plaintif, tidak menunjukkan kewujudan kontrak kolateral itu.

(3) Lagipun, sesuatu kontrak kolateral, mengikut sifatnya, wujud sebelah-menyebelah dengan kontrak utama. Ia tidak berkesan untuk menggantikan kontrak utama itu. Sesuatu kontrak kolateral H hanya memberi hak lain yang tidak diinkorporasikan di dalam kontrak utama, tetapi hak sedemikian mestilah kena-mengena dengan hak dan obligasi pihak-pihak kepada kontrak utama itu. Oleh itu, sebarang representasi yang dibuat oleh sesuatu pihak kepada kontrak itu yang berkesan untuk memusnahkan kontrak I utama, tidak boleh menjadi suatu kontrak kolateral. Di sini, dengan jelasnya terdapat suatu perjanjian di antara pihak-pihak untuk jual beli dua jentera penggali itu. Bagaimanapun, jika pendapat defendan diterima, kesan kontrak kolateral yang dikatakan itu adalah supaya memusnahkan kontrak penjualan utama atau untuk

mengubahkannya kepada suatu kontrak bersyarat. Tidak mungkin terdapat sesuatu kontrak kolateral tanpa wujudnya kontrak utama. Jikalau defendan dibenarkan memulangkan jentera penggali itu tanpa menanggung sebarang obligasi kewangan terhadap plaintif, kontrak utama akan menjadi tidak bermakna kerana defendan tidak lagi berobligasi untuk membeli jentera penggali itu di bawah kontrak utama itu.

(4) Tidak terdapat keterangan yang mencukupi untuk membuktikan bahawa jentera penggali yang dibekalkan oleh plaintif tidak layak untuk tujuan defendan. Defendan tidak membuktikan kehadiran keterangan yang lain, tetapi melainkan melalui ketegasannya bahawa jentera itu tidak sesuai. Defendan mengetahui sifat dan kebolehan jentera penggali yang telah dipesan olehnya. Apa yang sebenarnya telah dibekalkan ialah betul-betul model yang telah dipesan.

(5) Tindakan defendan apabila beliau menandakan kepada plaintif keengganannya untuk meneruskan pembelian dua jentera penggali itu dan meminta supaya plaintif mengambilnya balik, dengan jelas menjejaskan punca kontrak jualan itu dan merupakan suatu penolakan kontrak tersebut kerana ia menunjukkan niat untuk tidak meneruskan kontrak penjualan itu. Tindakan defendan dengan jelas merupakan suatu tindakan yang plaintif boleh menganggap sebagai suatu kemungkiran dalam jangkaan kontrak itu (anticipatory breach of the contract).

(6) Tidak terdapat sebarang bukti sebenar mengenai susut nilai jentera tersebut dan oleh itu, mahkamah tidak boleh memberikan apa-apa ganti rugi melainkan ganti rugi nominal.

Obiter:

Keadaanya mungkin berlainan jika defendan mengatakan, sepertimana dalam kes biasa, bahawa plaintif telah memberikan jaminan yang dua jentera itu boleh mengangkut beban timba 1.8 ela per dan juga timba 1.2 ela per. Dalam kes seperti itu, defendan mungkin membawakan tindakan terhadap plaintif untuk salah nyataan, atau kemungkiran syarat atau waranti di bawah kontrak kolateral itu.]

Notes

For a case on collateral contracts, see 3 *Mallal's Digest* (4th Ed) para 952.

For cases on anticipatory breach of contracts, see 3 *Mallal's Digest* (4th Ed) paras 833 and 834.

For cases on damages, see 3 *Mallal's Digest* (4th Ed) paras 1044–1046.

Cases referred to

1 *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5; [1976] QB 801; [1976] 2 WLR 583 (refd)

2 *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930 (refd)

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3 *Howard Marine & Dredging Co v Ogden & Sons (Excavations)* [1978] 2 All ER 1134; [1978] QB 574; [1978] 2 WLR 515 (refd)
4 *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220 (refd)
5 *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (refd)
B
6 *Gillespie Brothers & Co v Cheney, Eggar & Co* [1896] 2 QB 59 (refd)
7 *Hoyt's Pty Ltd v Spenser* [1919] 27 CLR 133 (refd)
8 *Lysnar v National Bank of New Zealand Ltd* [1935] NZLR 129 (refd)
9 *City and Westminster Properties (1934) Ltd v Mudd* [1958] 2 All ER
C
733; [1959] Ch 129; [1958] 3 WLR 312 (refd)
10 *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 (refd)
11 *Heilbut, Symons & Co v Buckleton* [1913] AC 30 (refd)
12 *Cullinane v British 'Rema' Manufacturing Co Ltd* [1953] 2 All ER 1257; [1954] 1 QB 292; [1953] 3 WLR 923 (folld)
D
13 *Commission Car Sales (Hastings) Ltd v Saul* [1957] NZLR 144 (folld)
14 *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 (distd)
15 *FC Shepherd & Co Ltd v Jerrom* [1986] 3 All ER 589; [1987] QB 301; [1986] WLR 801 (refd)
16 *Federal Commerce and Navigation Ltd v Molena Alpha Inc & Ors*
E
[1979] 1 All ER 307; [1979] AC 757; [1978] 3 WLR 991 (folld)
17 *Federal Commerce and Navigation Ltd v Molena Alpha Inc & Ors* [1978] 3 All ER 1066; [1978] 3 WLR 309; [1978] QB 927 (folld)
18 *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571; [1980] 1 WLR 277 (refd)
F
19 *Charter v Sullivan* [1957] 1 All ER 809; [1957] 2 QB 117; [1957] 2 WLR 528 (folld)
20 *Luna Park (NSW) Ltd v Transways Advertising Pty Ltd* (1938) 61 CLR 286 (folld)

ET Low (*MP Rajah & ET Low*) for the plaintiff.

G *Gurbakhash Singh* and *Sheena Gurbakhash* (*Gurbakhash & Tan*) for the defendant.

Visu Sinnadurai J:

Facts

H The plaintiff's action against the defendant is for damages for breach of contract arising from the sale of two new units of excavators sold by the plaintiff to the defendant. The plaintiff's claim is for the loss of the depreciated value of the two excavators which were recovered by the plaintiff from the defendant as a result of the repudiation of the contract by the defendant for
I the sale of the excavators.

The plaintiff's claim against the defendant is also for the recovery of rentals for two other units of excavators, namely, one new unit of the 115CL Poclain excavator and one used unit of the 90CL Poclain excavator which the plaintiff alleges were rented to the defendant.

The plaintiff in its statement of claim avers that by two agreements dated 23 August 1982, the plaintiff agreed to sell two new units of the Poclain hydraulic excavator, model 160CK at the price of RM290,000 each. A discount of RM20,000 was given by the plaintiff to the defendant towards the cost of the price of the two units of excavators. On 21 September 1982, the plaintiff delivered to the defendant one unit of the excavator, and on 28 September 1982, the second unit was delivered to the defendant. Both the excavators were delivered to the worksite of the defendant.

Pursuant to a letter written by the defendant to the plaintiff, whereby the defendant informed the plaintiff to take the machines back from the defendant's site, the plaintiff removed the two excavators from the defendant's site on 14 November 1982. The defendant in his letter to the plaintiff, informed the plaintiff that the new excavators were found to be unsuitable for its purpose.

The plaintiff alleged that as a result of the failure of the defendant to pay the cost of the two new units of excavators and the rentals for the other two units of excavators, the plaintiff had suffered loss and damage. In its statement of claim, the plaintiff particularizes the damage suffered as a consequence of the defendant's breach.

The defence

The defendant, in its defence, had not disputed the fact that it had agreed to purchase the two new excavators and that the excavators were in fact delivered to the defendant as stated by the plaintiff. The defendant, however, contends that the two excavators delivered by the plaintiff were not suitable for the purpose for which they were purchased as, amongst other reasons, the two excavators were not capable of bearing the weight of the 1.8cu yd buckets which had been fitted to the excavators. The defendant alleged that acting under an oral collateral warranty given by the plaintiff to the defendant to the effect that if the defendant found the excavators delivered to it to be unsuitable, the defendant could return them to the plaintiff without incurring any financial obligations, the defendant requested the plaintiff to take the excavators back, without having to pay the plaintiff any sum of money.

The issues

The issues before the court are rather straightforward and they are as follows:

(i) whether the defendant has established that the plaintiff did make the oral collateral warranty as asserted to by the defendant;
(ii) whether, if it has been established that there was such an oral warranty, the defendant was justified in returning the excavators to the plaintiff and in refusing to pay the purchase price;
(iii) whether, if there was no evidence of the existence of such a warranty, the defendant's refusal to pay for the excavators amounted to a repudiation of the contract;
(iv) whether, the plaintiff is entitled to receive rentals for the two other machines; and

(v) the quantum of damages the plaintiff is entitled to, if there has been a breach of the contracts.

The trial

The plaintiff commenced the present action against the defendant sometime in late 1982. However, the request to set down the action for trial was made only on 12 June 1987. In September 1988, the senior assistant registrar of the High Court informed the parties that the action had been entered in the trial book. The case was set down for trial on 15 February 1993, before this court, and the trial was fixed for 20, 22 and 23 April 1993. At the trial, the court was informed that there had been a change of solicitors and that the plaintiff was now represented by Messrs MP Rajah & ET Low. The trial proceeded as scheduled during the three days.

I state this background as to the chronology of events leading to this trial to explain the delay of almost ten years before this trial was heard. It appears that because of this delay, the parties had difficulty in locating their key witnesses. As a result, the plaintiff only produced two witnesses and the defendant only one.

The plaintiff's witnesses were Mr Santhasekran (PW1) and Mr Balakrishnan (PW2), whereas the defendant's only witness was Mr Wong Siam Shin who was then the managing director of the defendant company.

Plaintiff's witnesses

The plaintiff's first witness, Mr Santhasekran (PW1) said that he was the workshop manager of the plaintiff's company at the material time of the sale of the excavators. His job functions were to look after the after-sales operation of the excavators sold by the plaintiff. This witness informed the court that two work orders were issued for the sale of the excavators to the defendant. He said that the excavators were initially fitted with 1.2cu yd buckets and that, at the request of the defendant and after consultation with the suppliers in France, a bigger bucket of 1.8cu yd was fitted to each of the excavators. The witness said that certain after-sales services were done on these two excavators, and that at no time did the defendant inform him as to the unsuitability of the excavators. He admitted that there were a number of breakdowns of the excavators and that a special team had been assigned by the plaintiff to be located at the defendant's site to rectify any technical problems to the excavators. He said there were no major defects to the excavators and that only the hydraulic oil and hose had to be replaced.

During cross-examination, the witness said he was unaware of any discussion between the defendant and the sales manager of the plaintiff's company, one Mr Ang. He said he was not aware whether Mr Ang had given any oral warranty to the defendant.

The plaintiff's next witness, Mr Balakrishnan was an administrative executive in the plaintiff's company at the material time. He was then the administrative and credit controller. He merely confirmed that the sale documents and invoices were forwarded to his department for collection.

Defendant's witness

The defendant only called one witness, namely Mr Wong Siam Shin who was then the managing director of the defendant company. Mr Wong said in his evidence, that he negotiated the sale for the purchase of the two excavators with one Mr Ang who was then the sales manager of the plaintiff company. Mr Wong said that he ordered two excavators fitted with buckets with the capacity of 1.8cu yd and that the terms of payment were as stated in the order forms (D1 and D2). Mr Wong said that the sales manager, Mr Ang had told him that if the excavators could not be fitted with 1.8cu yd buckets, the plaintiff would take the excavators back. When asked whether the excavators were fit for the purpose for which they were bought, Mr Wong said that the excavators could not bear the weight when the 1.8cu yd buckets were fitted to them. Mr Wong then added that when the plaintiff was aware that the excavators could not take the weight of the 1.8cu yd buckets, they took the excavators back.

As for the payment for the excavators, Mr Wong said that no payment had been made by the defendant's company, as the time for payment had not been due then. He said that the plaintiff took back the excavators before the due date. During cross-examination by the plaintiff's counsel, Mr Wong said that when the excavators were first delivered, they were fitted with 1.2cu yd buckets and not with the 1.8cu yd buckets which had been ordered. However, he then said that the 1.8cu yd buckets which had been ordered were fitted to the excavators some ten days after they were delivered to the defendant. Again under cross-examination, Mr Wong said that he wrote the letter to the plaintiff to take the excavators back only two months after it was delivered because he had verbally told Mr Ang earlier about its unsuitability. He admitted, however, that though the excavators were not suitable, they were, in fact, used by the defendant at its worksite. During re-examination, Mr Wong said that he had not used the excavators since 11 October 1982.

Undisputed evidence

The evidence before the court appears to have established the following facts: (i) the defendant agreed to purchase the two excavators; (ii) the plaintiff delivered the said excavators; (iii) before the delivery of the said excavators, the plaintiff had delivered two other units of excavators for the use by the defendant until the new excavators were delivered; (iv) the defendant did use the old excavators as well as the new ones for their operations; (v) the defendant then informed the plaintiff that the new excavators were not suitable and therefore requested the plaintiff to take them back; and (vi) the plaintiff did take back the two new excavators.

Sale of the new excavators

I shall first deal with the plaintiff's claim regarding the sale of the two new excavators. In this regard, one fact is clearly not disputed by both the parties: the plaintiff agreed to sell the two excavators and that the defendant agreed to purchase the two excavators. What, however, is disputed is

whether the excavators that were supplied by the plaintiff were in accordance with the specifications requested for by the defendant.

The plaintiff asserts that the excavators that were supplied were in accordance with the terms that were agreed upon by the parties. The defendant, however, alleges that the excavators were not suitable for the purpose for which the defendant had bought them and, as such, it was entitled under the oral collateral warranty given by the plaintiff to return the excavators without having to pay anything for them.

I now consider the issue as to whether there was an oral collateral warranty.

(i) Whether the defendant has established the existence of a oral collateral warranty

The question as to whether the defendant has established the existence of an oral collateral warranty as to the suitability of the machines is relevant in determining whether the defendant had a right to return the two machines to the plaintiff.

At this juncture, it must be emphasized that the oral collateral warranty alleged by the defendant is that the plaintiff's then sales manager, Mr Ang, had informed the defendant that if the excavators were found to be unsuitable, the defendant was at liberty to return them to the plaintiff without incurring any financial obligation.

I should, perhaps point out that the use of the term 'oral collateral warranty' by the defendant, in its pleadings as well as in court, is not a happy one. Traditionally, an oral collateral warranty, is merely a term of a contract, the breach of which only entitles the party to sue for damages and does not give the party the right to repudiate the contract. Lord Denning MR in *Esso Petroleum Co Ltd v Mardon*[1] stated (at p 13):

> Ever since *Heilbut Symons & Co v Buckleton* [1913] AC 30, we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege ... that the misrepresentation was fraudulent, or alternatively a collateral warranty ... there have been many cases since I have sat in this court where we have readily held a representation — which induces a person to enter into a contract — to be a warranty sounding in damages.

In *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*,[2] an oral assurance was held to be an enforceable contractual promise; whereas in *Howard Marine & Dredging Co v Ogden & Sons (Excavations)*,[3] the oral representations were held not to be contractual warranties. See also the observations of Salleh Abas LP in the Federal Court decision of *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight*,[4] where his Lordship highlighted the confusion caused by the loose use of the term collateral warranty and collateral contracts.

In the present case, the defendant is not suing for damages based on the oral statement allegedly made by the plaintiff but is seeking the right to terminate the contract. Therefore, the term cannot be interpreted to mean a collateral warranty as stated by Lord Denning MR, above. I, therefore, take the use of the term by the defendant to mean a collateral contract.

A collateral contract is defined by 1 *Chitty on Contracts* (25th Ed) para 734 as follows:

> ... the courts are prepared in some circumstance to treat a statement intended to have contractual effect as a separate contract or warranty collateral to the main transaction.

See also 41 *Halsbury's Law of England* (4th Ed) para 681 n 7.

Similarly, Raja Azlan Shah CJ (as his Majesty then was) in the leading case on collateral contracts in Malaysia, *Tan Swee Hoe Co Ltd v Ali Hussain Bros*[5] said [at p 19]:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

I do not intend to give a full discourse on the principles governing collateral contracts, except to say that a cautious approach is adopted by the courts in recognizing the existence of a collateral contract, especially in cases where it contradicts the terms of a written contract. The objective, however, of using the device of the collateral contract is usually to enforce a promise made prior to the making of the main contract, and but for which the main contract would not have been made.

It is an established principle of law that the burden of proving the existence of a collateral contract is on the party alleging its existence. In *Gillespie Brothers & Co v Cheney, Eggar & Co*,[6] Lord Russell of Killowen CJ said [at p 62]: '... when the parties arrive at a definite written contract the ... presumption is ... that [the writing was] intended to contain all the terms of their [contract; but] it is a presumption only, and ... either of the parties may allege ... an antecedent express stipulation ... intended to continue in force with the ... written [contract] ...', and may contend that the written contract was not intended to include all the terms.

It is sometimes said that a collateral contract may merely add, but not contradict the main agreement: see Lewison, *Interpretation of Contracts* (1989) para 2.07; and the Australian case of *Hoyt's Pty Ltd v Spenser*.[7] In *Lysnar v National Bank of New Zealand Ltd*,[8] Lord Wright, in delivering the advice of the Privy Council said:

> Though the collateral contract must, inevitably, it seems, add to the written contract, it must not vary it in the sense of being inconsistent with or contradictory of, the written contract to which it is collateral ...

Such a view, however, is no longer accepted as the general rule: see *City and Westminster Properties (1934) Ltd v Mudd*.[9] Raja Azlan Shah CJ (as his Majesty then was) in *Tan Swee Hoe*,[5] said [at p 18]:

> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts.

Similarly, Lord Brightman, in the Privy Council decision of *Kandasami v Mohamed Mustafa*,[10] on appeal from Malaysia, said [at p 88]:

> If parties put their names to a document, and one party represents and the other party agrees that the document shall not, as between themselves, have any legal effect so that it exists only to answer some other purpose, the law will give effect to that collateral agreement and deny the document whatever legal effect it might otherwise have had.

The question that needs to be addressed now is whether the defendant has adduced sufficient evidence to establish that the plaintiff made the oral statement, amounting to a collateral contract to the defendant that if the defendant found the excavators to be unsuitable, the defendant could return them to the plaintiff. It should be borne in mind that no such term was incorporated into the sales invoices. The sales invoices clearly indicated that the two excavators were an outright sale to the defendant by the plaintiff. The invoices expressly provided for the description of the goods, and the mode of payment, viz 60 days' credit with payment over four monthly instalments. However, the defendant relies on the alleged oral representation made by the plaintiff, specifically by Mr Ang, that the plaintiff was prepared to treat the delivery of the two excavators to the defendant on a trial basis.

As stated earlier, the onus of establishing the existence of a collateral contract is, of course, on the defendant. The defendant has to establish sufficient evidence to show that the plaintiff and the defendant agreed to the making of a collateral contract independent of the main contract. The main contract in this case is for the sale and purchase of the two excavators. The collateral contract, the existence of which as alleged by the defendant, is that the parties agreed that if the excavators were found unsuitable by the defendant, the defendant could return them without any financial obligations to the plaintiff.

In the present case, there appears to be no sufficient evidence adduced by the defendant to satisfy the court as to the existence of such a collateral contract. The only evidence is the mere assertion by the defendant that such a contract was in existence as a result of the representation made by the plaintiff's sales manager, Mr Ang. Mr Ang was not called as a witness, nor for that matter, was any other witness called to establish the existence of such a warranty. The mere fact that the defendant deemed that it was rightful for him to return the two excavators to the plaintiff, does not in itself establish the existence of such a collateral contract. In any case, I am unable to accept the evidence of Mr Wong alone as sufficient to establish the existence of a collateral contract. As it is often said, 'such collateral contracts must from their very nature be rare': per Lord Moulton in *Heilbut, Symons & Co v Buckleton*.[11] (But see the observation of Lord Denning MR in *Howard Marine v Ogden & Sons*.[3])

Therefore, in the absence of any evidence, this court finds that the defendant has failed to establish the existence of any oral collateral contract, or for that matter, even a collateral warranty.

Even if I am wrong in so holding, the argument that the defendant has a right to terminate the contract by virtue of the oral collateral contract is

misconceived. A collateral contract, by its very nature, exists side by side with the main contract. It does not have the effect of substituting the main contract. A collateral contract merely confers certain other rights which are not incorporated in the main contract. But such rights must be related to the rights and obligations of the parties under the main contract.

In the present case, there is clearly an agreement between the parties for the sale and purchase of the two excavators. However, if the defendant's contention is accepted, the effect of the alleged collateral contract is to obliterate the main contract of sale or to convert it into a conditional contract. There cannot be a collateral contract without the main contract being in existence. If the defendant is allowed to return the excavators without incurring any financial obligation to the plaintiff, the main contract becomes meaningless as the defendant is no longer under any obligation to buy the excavators under the main contract.

It would have been different, if the defendant had alleged, as often is the case in collateral contracts, that the plaintiff gave an assurance that the two excavators were capable of bearing the weight of the 1.8cu yd buckets as well as the 1.2cu yd buckets. In such a case, the defendant may bring an action against the plaintiff for misrepresentation, or breach of condition or warranty under the collateral contract. To say that the promise made by the plaintiff that the defendant could return the excavators, tantamounts to the cancellation of the fundamental term of the main contract. To invoke the concept of collateral contract to cover such a situation is to stretch the scope of collateral contracts beyond their legitimate limits. Any representation made by a party to the contract which has the effect of destroying the main contract, cannot become a collateral contract. It may be anything else, but certainly not a collateral contract, as a collateral contract normally relates to a warranty and not to a fundamental term of the main contract.

Furthermore, it should be pointed out that, in any case, a breach of a collateral contract only gives right to an action for damages for its breach and not a right to repudiate. As *Chitty on Contracts*, quoted above, states (at para 735):

> Breach of the collateral contract will give rise to an occasion for damages for its breach, but not to a right to treat the main contract as repudiated.

As the defendant's contention based on the collateral contract or warranty is misconceived, the defence must necessarily fail. However, for purposes of completeness, I move on to consider whether the excavators were unsuitable.

(ii) Whether the excavators were suitable for the defendant's purpose

Even if the defendant could establish the existence of the oral collateral contract, the defendant may only be able to invoke the oral collateral contract, if the defendant can also establish that the excavators supplied by the plaintiff were in fact unsuitable for the defendant's purpose.

The plaintiff's witness, Mr Santhasekran (PW1) who was the workshop manager said in evidence that he consulted the principal manufacturer in France who had assured him that the excavators were capable of being fitted with 1.8cu yd buckets, as required by the defendant. He also said that

A the two excavators were serviced on a routine basis and that the breakdowns of the excavators as alleged by the defendant were not major. They merely related to the change of the hydraulic hose and the hydraulic oil. He also said that to his knowledge there were no major defects in the excavators, nor did the defendant complain to him of the unsuitability of the excavators.

B The witness also said that because the defendant was a potential customer which the directors of the plaintiff company intended to have more business with, a special after-sales service team was assigned to the defendant's worksite to ensure that good service to the defendant was provided and also to rectify immediately any mechanical problems to the excavators. He expressly denied during cross-examination that the excavators could not be C fitted with 1.8cu yd buckets. He admitted, however, because of the extra load factor, some problems were anticipated with regard to the hydraulic system of the excavators, none, however, which would deprive the defendant of the use of the excavators for any significant period.

The defendant, although alleging that the excavators were unsuitable, tendered no evidence to substantiate its allegation. Much of the evidence D given by the only witness for the defence, centred around the issue as to whether the oral collateral warranty (contract) was made by the plaintiff. When asked during examination-in-chief whether the excavators that were delivered were fit for the purpose for which they were purchased, he merely said, 'No, because the excavators could not bear the weight of the 1.8cu yd E buckets'. When asked during cross-examination whether he had personal knowledge of the unsuitability of the excavators, he could not give a firm answer. Furthermore, he admitted that the excavators were used by the defendant for over a period of two months, even though he maintained that he found the excavators unsuitable from the time they were fitted with the 1.8cu yd buckets.

F In considering the totality of the evidence, I find that there is insufficient evidence to establish that the excavators which were supplied by the plaintiff were unsuitable for the defendant's purpose. The defendant has not established any other evidence, other than his own bare assertion that it was unsuitable. The defendant knew the nature and capability of the excavators G that were ordered by it. The defendant wanted the capacity of the buckets to be changed from the standard 1.2cu yd to 1.8cu yd so as to minimise the cost of the operation of his business. What in fact was supplied to him was the exact model of the excavators as ordered, and in accordance with its own specifications, fitted with 1.8cu yd buckets.

The defendant was not supplied with an entirely different model of the H excavators nor for that matter, a totally different machine which could not be used for the purpose for which it was ordered — the excavators were still capable of excavating sand, though probably in lesser quantity. It is not a question of peas being delivered for beans ordered.

Even if the plaintiff gave an assurance that the 1.8cu yd buckets could be I fitted to the excavators, and the excavators did not function as well as the defendant wanted them to, the defendant's recourse against the plaintiff, as pointed out earlier, would be for damages for breach of warranty. As Sir Evershed MR (as he then was) said in *Cullinane v British 'Rema' Manufacturing Co Ltd*[12] [at p 1261]:

> As a matter of principle again, it seems to me that a person who has obtained a machine ... which was mechanically in exact accordance with the order given, but was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may, when he discovers its incapacity and that it is not what he wanted and is useless to him, claim to recover the capital cost he has incurred less anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. ... Alternatively, he may, where the warranty in question relates to performance, make his claim on the basis of the profit he has lost, because the machine as delivered fell short in its performance of that which it was warranted to do.

(iii) Breach of contract by the defendant

The action of the defendant when it indicated to the plaintiff that it did not wish to proceed with the purchase of the two excavators and requesting the plaintiff to take them back, clearly went to the root of the contract of sale and amounted to a repudiation of the contract as it evinced an intention not to proceed with the contract for sale. In *Commission Car Sales (Hastings) Ltd v Saul*,[13] the Supreme Court of New Zealand held that the buyer who returned the car which he had promised to buy and intimated that he would not pay for it, had repudiated liability for its purchase, and the seller, by accepting the car, was taken to have treated the contract as discharged by breach. On a repudiation of the contract, the plaintiff has the choice either to accept the repudiation or to affirm the contract: see s 40 of the Contracts Act 1950 and the cases referred to on this section in Sinnadurai, *Law of Contract in Malaysia and Singapore* (2nd Ed). In the present case, when the plaintiff took possession of the two excavators, it in fact accepted the defendant's repudiation of the contract.

The argument by the defence that the defendant could not have repudiated the contract at that stage (when they wrote the letter to the plaintiff), since on that date none of the payments were then due, is unacceptable as the act of the defendant clearly amounted to one which the plaintiff could treat as an anticipatory breach of the contract. The decision of the Federal Court in *Sio Koon Lin & Anor v SB Mehra*,[14] which was referred to by counsel is, therefore, not only irrelevant but clearly distinguishable. As Mustill LJ (as he then was) said in *FC Shepherd & Co Ltd v Jerrom*,[15] at p 600:

> If the promisor renounces the contract, or disables himself from performing it, the promisee may elect to treat the contract as broken by anticipation, and may sue for damages without waiting for the time for performance to arrive: see *Hochster v De la Tour (1853) 2 E & B 678; [1843–60] All ER Rep 12*, and many subsequent cases.

As to anticipatory breach, see s 60 of the Malaysian Sale of Goods Act 1957 and generally, 41 *Halsbury's Laws of England* (4th Ed) para 867 and *Benjamin's Sale of Goods* (3rd Ed) paras 1307–1308.

It should further be pointed out that a refusal by a party to proceed with the contract based upon a misconstruction of the contract or on the erroneous belief that he was justified in terminating the contract, may amount to a repudiation of the contract, especially so, if the party evinces an intention to perform only in accordance with his construction of the

contract. Such was the situation in *Federal Commerce and Navigation Ltd v Molena Alpha Inc & Ors*,[16] where, because of their erroneous construction of the contract, the shipowners threatened to act in a way which was substantially inconsistent with their obligations. The conduct of the shipowners in so acting was held by the House of Lords to amount to a repudiation of the contract. Lord Denning MR in the Court of Appeal in *Federal Commerce and Navigation Ltd v Molena Alpha Inc & Ors*,[17] said (at p 1082):

> I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers; or that he was under an honest misapprehension ... I would go by the principle ... that if the party's contract, objectively considered in its impact on the other party, is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his repudiation and treat the contract as discharged from that time onwards.

In this regard, the minority view of the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*,[18] is to be preferred.

(iv) Measure of damages

The plaintiff, as stated earlier, has claimed for loss and damage suffered as a consequence of the defendant's breach. In particularizing its loss, the plaintiff claims for the depreciated value of the excavators. The plaintiff did not claim for the loss of profit nor for any loss resulting from a subsequent resale of the excavators to a third party. The claim is basically for depreciation loss of the two excavators. Of course, in a normal situation such as this, the seller would have claimed for the difference between the market price, when the goods were subsequently sold in the market, and the contract price. However, this is not the situation in the present case. The plaintiff in claiming for the depreciation loss of the two excavators, did not adduce any proof of any such loss. No evidence was adduced to show that the excavators had depreciated in value by 20% when they were recovered from the defendant.

Counsel for the plaintiff urges this court to take judicial notice of the fact that any vehicle or machine depreciates in value after it had been sold to another person. In the absence of any authority to support this proposition, this court is unable to concede to the plaintiff's contention.

It should be further remembered that damages are not meant to be punitive in nature but rather compensatory, that is, to put the plaintiff in the same or similar position, as far as possible, as he would have been had the contract not been breached by the other party. It is, therefore, important for the plaintiff to establish his loss, and not, so much as what the defendant had gained from the breach. Therefore, the court, cannot, in the absence of any proof of actual loss by the plaintiff, grant the plaintiff any sum by way of damages. Even if the court were to concede that there was an element of depreciation of the value of the excavators, in the absence of any proof to show the actual loss, the plaintiff's claim must fail. There may be a situation where the plaintiff may have sold the excavators, subsequently, to a third party at a profit. In such a case, the plaintiff would have suffered no loss.

Therefore, this court is unable to grant any sum of money by way of damages to the plaintiff except by way of nominal damages. In *Charter v Sullivan*,[19] nominal damages were granted as the seller was unable to produce any evidence of loss of profit as a consequence of a buyer's refusal to complete the purchase. Similarly, the High Court of Australia in the case of *Luna Park (NSW) Ltd v Transways Advertising Pty Ltd*,[20] also granted nominal damages, even though there was a breach of a condition of the contract. I, therefore, grant a sum of RM100 by way of nominal damages to the plaintiff.

As for the other claims by the plaintiff, loss of use of the said machines at RM15,000 per machine, again in the absence of any proof by the plaintiff of this loss, the plaintiff's claim under this head also fails.

As for the plaintiff's claim for transport and possession charges, these stand on a different footing, as these have been substantiated by documentary evidence, and as such, I allow RM1,000 under this head: see *Benjamin's Sale of Goods* (3rd Ed) para 1313.

I also allow the claim for RM2,485 being charges for repairs and services of the two excavators during the period when they were used by the defendant, as the defendant was contractually bound to pay for these items.

Rental of the two other machines

The entire trial centered on the sale of the two excavators, and except as stated in the statement of claim, the plaintiff gave no evidence as to any rental arrangement between the plaintiff and the defendant regarding the other two excavators. In the absence of evidence, it appears that these two machines were lent to the plaintiff for the defendant's use until the new machines arrived.

I, therefore, hold that, as the plaintiff has not made out its case with regard to the rental of the two other excavators, the claim is dismissed.

As the plaintiff has succeeded substantially in its action against the defendant, I order that costs be awarded to the plaintiff.

Order accordingly.

Reported by S Radhakrishnan